

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

TIMOTHY B. O'BRIEN LLC
d/b/a Apple Wellness
6313 McKee Road
Fitchburg, WI 53719,

Plaintiff,

v.

Case No. 18-CV-684

DAVID KNOTT
8309 Murphy Drive
Middleton, WI 53562, and

EMBRACE WELLNESS LLC
8309 Murphy Drive
Middleton, WI 53562,

Defendants.

COMPLAINT

Now comes Plaintiff, Timothy B. O'Brien LLC, by its undersigned attorneys, Kramer, Elkins & Watt, LLC and complains against Defendants, David Knott and Embrace Wellness LLC, as follows:

JURISDICTION AND VENUE

1. This action is brought pursuant to Section 43(a) of the Lanham Act, false designations of origins. (15 U.S.C. § 1125(a)(1)(A)).
2. Jurisdiction is specifically conferred on this Court by 28 U.S.C. § 1331.

3. The Court has pendent jurisdiction over the state law claims because the claims are so closely related to Plaintiff's federal false designations of origin claims that they form parts of the same case or controversy under Article III of the United States Constitution. 28 U.S.C. § 1367(a).

4. Venue is proper within the United States District Court for the Western District of Wisconsin because the false designations of origin violations and other related actions were committed within the jurisdiction of this District. 28 U.S.C. § 1391(b)(2).

PARTIES

5. Plaintiff Timothy B. O'Brien LLC ("Apple Wellness") is a Wisconsin limited liability company that does business as "Apple Wellness" and has its principal place of business located at 63163 McKee Road, Fitchburg, Wisconsin 53719 and 2824 Prairie Lakes Dr., Suite 108, Sun Prairie, WI 53590 with Fitchburg as the main location. Tim O'Brien ("Tim") and Becki O'Brien ("Becki") are the two members of Apple Wellness and are both adult residents of Wisconsin.

6. Upon information and belief, Defendant Embrace Wellness LLC ("Embrace Wellness") is a Wisconsin limited liability company with its principal place of business located at 8309 Murphy Drive, Middleton, Wisconsin 53562.

7. Upon information and belief, Defendant David Knott ("Knott") is an adult resident of the State of Wisconsin with an unknown primary residence address, is a member of Embrace Wellness, and is the registered agent of Embrace Wellness with a registered agent's office at 8309 Murphy Drive, Middleton, Wisconsin 53562.

GENERAL ALLEGATIONS

8. Plaintiff repeats and realleges all allegations in the preceding paragraphs.

9. Apple Wellness operates two (2) retail stores named “Apple Wellness” with one location in Fitchburg, Wisconsin and one location Sun Prairie, Wisconsin, and each store sells vitamins, nutritional supplements, essential oils, personal care products, water purification systems and more (the “Apple Wellness Stores”).

10. The Fitchburg location opened in June 2010, and the Sun Prairie location opened in January 2016

11. Apple Wellness also operates a website, apple-wellness.com, where it offers vitamins and nutritional supplements for sale and purchase.

Apple Wellness Trade Dress

12. Plaintiff repeats and realleges all allegations in the preceding paragraphs.

13. Becki has a degree in graphic design and marketing and used her education and skillset to design the interior of the Apple Wellness Stores and to craft the logos and other branding for Apple Wellness.

14. In designing the interior of the Apple Wellness Stores, Apple Wellness, through Becki, sought to create a bright, energetic and upscale yet inviting and comfortable interior that differed from traditional vitamin and nutritional stores.

15. To achieve the vision for the interior of the Apple Wellness Stores, Becki and Tim designed shelving and poster displays which were then custom built out of maple with a clear matte finish that highlights the wood grain and tones (“Maple Shelving”).

16. The design and implementation of custom built shelving costs significantly more than pre-made shelving.

17. Despite this cost difference, Apple Wellness deemed the Maple Shelving a crucial component of the interior aesthetic of the Apple Wellness Stores that also serves as a part of the Apple Wellness Stores' branding.

18. In the Apple Wellness Stores, Maple Shelving is placed along the perimeter of each of the store walls with the shelves holding retail items.

19. Above the perimeter Maple Shelving are wooden rectangular cabinets (also custom built out of the same materials as the Maple Shelving) which display posters with either motivational phrases or images of individuals enjoying their healthy lifestyle. Becki hand selected each poster to contribute a feeling of energy and vitality to the Apple Wellness Stores.

20. Up until about June 2018, both the Fitchburg store and the Sun Prairie store had brightly colored posters of individuals enjoying their healthy lifestyle in the cabinets.

21. In June, 2018, Apple Wellness changed the posters in the Fitchburg store to be black and white.

22. The posters in the Sun Prairie store were not changed and continue to be brightly colored posters of individuals enjoying their healthy lifestyle.

23. Above the posters are descriptions of the types of products found on the shelving below.

24. The Maple Shelving also appears in parallel rows along the interior of the stores roughly four feet in height with shelves containing retail items and a flat, unadorned top.

25. On top of the interior Maple Shelving are small potted plants.

26. The Apple Wellness Store ceilings are industrial style with exposed pipes and ducts, painted black.

27. The walls of the Apple Wellness Stores are painted a bright apple green.

28. The bright apple green color was determined based on Becki's study of color theory and was chosen to convey an energetic and lively feeling upon entering an Apple Wellness store, which contrasts the dark or neutral wall color of most retail stores including other Madison vitamin and nutrition stores.

29. Unlike many retail stores that use commercial tile for flooring, the floors in the Apple Wellness Stores are wood laminate which Becki chose to evoke a warm home-like atmosphere.

30. Each of the Apple Wellness Stores has a designated play area for children complete with colorful toys and games.

31. Apple Wellness exclusively plays a local radio station, Christian Life 102.5, in the Apple Wellness Stores.

32. The Apple Wellness Store hours are 10am to 7pm, Monday through Friday and 10am to 6pm Saturday, and the Apple Wellness Stores are closed on Sundays.

33. As a key component of its ongoing marketing strategy, Apple Wellness posts on social media photographs of product offerings taken within the Apple Wellness Stores with the interior of the stores – including the custom built light maple shelving, light maple framed lively promotional posters and bright colored walls – serving as the backdrop for the promotion of the product.

34. In a similar fashion, Apple Wellness films promotional content and broadcasts “live feeds” from within its stores, again using the interior of the store as a backdrop, and places the films or live feeds on its social media outlets, including Facebook.

35. In this way, the products offered by Apple Wellness are inextricably entwined to the interior appearance of the store.

36. The interior of the Apple Wellness Stores have remained substantially the same since the inception of each store.

37. Apple Wellness conducts a sale every two months where every item in the store is 20% off for one entire week.

38. Apple Wellness practices price matching where if a customer were to bring in evidence of a product offered at Apple Wellness that is less expensive at another outlet, Apple Wellness will match the price.

39. Until Embrace Wellness began engaging in price matching, Apple Wellness was the only vitamin and nutrition store that engaged in price matching in the Dane County area.

40. Apple Wellness offers a membership program whereby a customer can pay \$10 annually to receive 10% off anything in the store.

41. Apple Wellness' business cards contain an offer where the card can be handed off to a friend or family member who has never shopped at Apple Wellness, and the new customer will receive 20% off their next purchase, and the referring customer will receive \$10 off of their purchase.

42. The aforementioned practices and Apple Wellness characteristics in paragraphs 13 to 41 in this Complaint constitute the trade dress of Apple Wellness ("Apple Wellness Trade Dress").

43. The aforementioned practices by Apple Wellness in paragraphs 32-34, 37-38, 40-41 constitute "Apple Wellness Marketing and Sales Techniques."

Mountain Logo Mark

44. Apple Wellness developed a logo featuring three (3) overlapping mountains (the "Mountain Logo Mark") for use in connection with the sale of vitamins and nutritional supplements.

45. Apple Wellness has used the Mountain Logo Mark continuously and extensively since at least as early as June 2010 and has it displayed on its website, social media pages including Facebook, on apparel worn by its employees, and in certain other locations.

46. Apple Wellness has devoted substantial amounts of time and money to the marketing and promotion of the Mountain Logo Mark as well as products and services offered thereunder.

47. Apple Wellness has used the Apple Wellness Trade Dress and the Mountain Logo Mark in connection with the sale and promotion of its products and services.

48. As a result of their widespread use, the Apple Wellness Trade Dress and Mountain Logo Mark have become to be known as source identifiers for high quality Apple Wellness products.

David Knott and Embrace Wellness

49. Apple Wellness repeats and realleges the allegations in the previous paragraphs.

50. David Knott worked full time as an assistant manager in the Fitchburg Apple Wellness store from October 2013 to January 2016; then worked as the manager in the Sun Prairie store until April 30, 2016; then was demoted to a Wellness Consultant and worked in this role until February 16, 2017.

51. Knott spent most of his working time within the Apple Wellness Stores and had access to Apple Wellness records including timeclock records, vendor information including

negotiated discount numbers, product and inventory information, sales data, customer contact information and purchase history as well as other valuable information.

52. Knott opened “Embrace Wellness” in Middleton, Wisconsin on or around November 2017 and it sells substantially the same products as the Apple Wellness Stores including nutritional supplements and vitamins.

53. Knott and Embrace Wellness copied the design and layout of the interior of the Apple Wellness Stores.

54. Embrace Wellness has shelving made of light colored wood that shows the grain and tone of the wood (“Imitated Maple Shelving”) that looks almost identical to the Maple Shelving.

55. The interior of the Embrace Wellness store contains Imitated Maple Shelving in parallel rows in the interior of the stores roughly four feet in height with shelves containing retail items and a flat, unadorned top.

56. On top of the interior shelving of Embrace Wellness are small potted plants.

57. Above the perimeter shelving (in the same style as the Imitated Maple Shelving) are wooden rectangular cabinets which display posters with brightly colored images of individuals enjoying their healthy lifestyle

58. The floor of Embrace Wellness is either dark wood, dark laminate wood, or is made from a material such as vinyl wood flooring that is designed to look like dark wood.

59. Embrace Wellness’s walls are painted a bright color that is substantially similar to the Apple Wellness bright green in that it is a bright blue which is adjacent to the Apple Wellness bright green on the color wheel.

60. The ceiling of Embrace Wellness is industrial style with exposed duct work and pipes and painted a dark black like color.

61. Embrace Wellness has an area for children to play which contains colorful toys.

62. Upon information and belief, Embrace Wellness plays the local radio station Christian Life 102.5 in its store.

63. The logo for Embrace Wellness contains three mountain peaks, sometimes with a sun behind it and sometimes without the sun behind it (the “Embrace Wellness Logo”).

64. The Embrace Wellness logo is substantially similar to the Mountain Logo Mark used by Apple Wellness.

65. Defendants have copied several of Apple Wellness’ Marketing and Sales Techniques.

66. Embrace Wellness conducts a sale every two months where every item in the store is 20% off for one entire week. This week often coincides with the week Apple Wellness offers its storewide 20% off sale.

67. Upon information and belief, Embrace Wellness practices price matching where if a customer were to bring in evidence of a product offered at Embrace Wellness less expensive at another outlet, Embrace Wellness will match the price.

68. Embrace Wellness offers a membership program whereby a customer can pay \$10 annually to receive 10% off anything in the store.

69. Embrace Wellness’ business cards contain an offer where the card can be handed off to a friend or family member who has never shopped at Apple Wellness, and the new customer will receive 20% off their next purchase, and the referring customer will receive \$10 off of their purchase.

70. Embrace Wellness posts videos from within the store whereby David Knott appears discussing various products or other nutrition-related topics and the videos are posted to social media outlets, or the content may be presented live. The videos are often filmed inside Embrace Wellness stores with the interior of the store serving as a backdrop for the films.

71. Embrace Wellness uses the interior of its store which is the Apple Wellness Trade Dress as its Facebook cover photo.

72. Embrace Wellness promotes products by taking photos of the products and posting the products on social media with the interior of the Embrace Wellness store as a backdrop.

Apple Wellness' Requests that Embrace Wellness Cease and Desist

73. Apple Wellness has notified Defendants that their continued use of Apple Wellness' trade dress, copyright and trademarks including the Embrace Wellness Logo is unauthorized, and Apple Wellness has demanded that Defendants cease and desist such use.

74. Despite Apple Wellness's demands to cease its infringement, Defendants have willfully continued to use its interior store design in violation of Apple Wellness's underlying intellectual property rights in the trade dress.

75. Defendants began using the Embrace Wellness Logo with full knowledge of Apple Wellness's prior use and rights in the Mountain Logo Mark.

76. After receiving Apple Wellness's demand to cease and desist use of the Embrace Wellness Logo, Embrace Wellness has registered its logo as part of three (3) separate combination marks with the State of Wisconsin.

77. Despite Apple Wellness's demands to cease its infringement, Defendants have continued to operate their store with an interior identical to the interior of the Apple Wellness

Stores, and willfully continued to offer services under the Embrace Wellness Logo and in doing so is causing irreparable harm to Apple Wellness's reputation and goodwill, and causing actual deception to consumers.

78. Customers of Apple Wellness have commented that the Embrace Wellness store closely resembles Apple Wellness's Retail Stores and that they were confused by the remarkably similar resemblance.

79. Multiple customers asked Becki and/or Tim if Apple Wellness is affiliated with Embrace Wellness.

80. Multiple customers have stated to Becki and/or Tim that the Embrace Wellness store is "identical to" or "the same as" the Apple Wellness stores.

81. Multiple customers have stated to Becki and/or Tim that the Embrace Wellness store is so similar to Apple Wellness that it is confusing.

**COUNT I:
Unfair Competition, False Designation of Origin and Trade Dress Infringement
Pursuant to Section 43(a) of the Lanham Act 15 U.S.C. 1125(a)(1)(A)**

82. Apple Wellness incorporates the allegations set forth in the preceding paragraphs as if fully set forth herein.

83. The Apple Wellness Trade Dress is legally protectable because it has been continuously used by Apple Wellness in interstate commerce and Apple Wellness has been using it to identify and distinguish its goods and services from goods and services produced by others for a period of over eight years.

84. The Apple Wellness Trade Dress is non-functional in that it serves no purpose other than the identification of source, origin and sponsorship of the Apple Wellness goods and services.

85. In using the Apple Wellness Trade Dress in interstate commerce, Defendants' actions are likely to cause confusion, mistake or deception as to the source, origin, affiliation, connection or association of Defendants with Apple Wellness and as to the origin, sponsorship, association or approval of the Defendants' services and goods by Apple Wellness and thus their actions constitute unfair competition, trade dress infringement, false designation of origin and passing off in violation of Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A).

86. Apple Wellness never gave permission for Defendants to use the Apple Wellness Trade Dress.

87. Defendants' actions have taken place with full knowledge of Apple Wellness's rights to the Apple Wellness Trade Dress and, therefore, have been intentional, deliberate, and willful.

88. Defendants actions are calculated specifically to benefit from the goodwill that Apple Wellness has developed.

89. As a direct and proximate result of the Embrace Wellness's actions, Apple Wellness has been damaged and will continue to be damaged and is entitled to recover actual damages, additional damages equal to an amount up to three (3) times that amount of its actual damages, an amount equal to profits realized by Defendants engaging in said unfair competition, trade dress infringement, false designation of origin, and passing off, and all costs of litigation that have reasonably been incurred, including actual attorneys' fees pursuant to Section 43(a) of the Lanham Act, 15 U.S.C. 1117(a).

COUNT II
Unfair Competition, False Designation of Origin and Trademark Infringement
Pursuant to Section 43(a) of the Lanham Act 15 U.S.C. 1125(a)(1)(A)

90. Apple Wellness incorporates the allegations set forth in the preceding paragraphs as if fully set forth herein.

91. Apple Wellness has developed the Mountain Logo Mark which is displayed on its website, social media pages including Facebook, on apparel worn by its employees, and in certain other locations.

92. As a result of Apple Wellness' substantial and extensive advertising of products offered under the Mountain Logo Mark, Apple Wellness has acquired valuable goodwill in the Mountain Logo Mark and the mark signifies to consumers that Apple Wellness is the source of products and services being offered under the Mountain Logo Mark.

93. The Mountain Logo Mark is a strong mark and is inherently distinctive of the products and services provided thereunder.

94. The Embrace Wellness Logo is substantially similar to the Mountain Logo Mark.

95. In using the Mountain Logo Mark, Defendants actions are likely to cause confusion, mistake or deception as to the source, origin, affiliation, connection or association of Defendants with Apple Wellness and as to the origin, sponsorship, association or approval of the Defendants' services and goods by Apple Wellness and thus their actions constitute unfair competition, trademark infringement, false designation of origin and passing off in violation of Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A).

96. Apple Wellness never gave permission for Defendants to use its Mountain Logo Mark.

97. Defendants' actions in using the Embrace Wellness Logo have taken place with full knowledge of Apple Wellness's trademark and, therefore, have been intentional, deliberate, and willful.

98. Defendants' actions are calculated specifically to trade off the goodwill that Apple Wellness has developed.

99. As a direct and proximate result of Embrace Wellness's actions, Apple Wellness has been damaged and will continue to be damaged and is entitled to recover actual damages, additional damages equal to an amount up to three (3) times that amount of its actual damages, an amount equal to profits realized by Defendants in engaging in said unfair competition and trade dress infringement, and all costs of litigation that have reasonably been incurred, including actual attorneys' fees pursuant to Section 43(a) of the Lanham Act, 15 U.S.C. 1117(a).

COUNT IV Common Law Trade Dress Infringement

100. Apple Wellness incorporates the allegations set forth in the preceding paragraphs as if fully set forth herein.

101. The Apple Wellness Trade Dress is owned by Apple Wellness and constitutes the trade dress of Apple Wellness and has been used by Apple Wellness in interstate commerce for a period of eight years.

102. The Apple Wellness Trade Dress is a particular arbitrary combination which may contain functional features, but the combination of the features together is not functional.

103. Defendants used the Apple Wellness Trade Dress in a manner that is likely to cause confusion, mistake or deception as to the source, origin, affiliation, connection or association of Embrace Wellness's products and services with those products and services of Apple Wellness, or as to the approval of Embrace Wellness's products and services by Apple

Wellness, and thus constitutes constitute trade dress infringement in violation of Wisconsin common law.

104. Apple Wellness never gave permission for Embrace Wellness to use its trade dress.

105. Defendants' actions are calculated specifically to benefit from the goodwill that Apple Wellness has developed.

106. Defendants' actions have taken place with full knowledge of Apple Wellness's trade dress rights and, therefore, have been intentional, deliberate, and willful.

107. As a direct and proximate result of Defendants' actions, Apple Wellness has been damaged and will continue to be damaged.

COUNT V
Common Law Trademark Infringement

108. Apple Wellness incorporates the allegations set forth in the preceding paragraphs as if fully set forth herein.

109. Apple Wellness has developed the Mountain Logo Mark which is displayed on its website, social media pages including Facebook, on apparel worn by its employees and in certain other locations.

110. As a result of Apple Wellness' substantial and extensive advertising of products and offered under the Mountain Logo Mark, Apple Wellness has acquired valuable goodwill in the Mountain Logo Mark and the mark signifies to consumers that Apple Wellness is the source of products and services being offered under the Mountain Logo Mark.

111. The Mountain Logo Mark is a strong mark and is inherently distinctive of the products and services provided thereunder.

112. The Embrace Wellness Logo is substantially similar to the Mountain Logo Mark.

113. Defendants' use of the Embrace Wellness Logo is likely to cause confusion, mistake or deception as to the source, origin, affiliation, connection or association of Embrace Wellness's products and services with those products and services of Apple Wellness, or as to the approval of Embrace Wellness's products and services by Apple Wellness, and thus constitutes trademark infringement in violation of Wisconsin common law.

114. Apple Wellness never gave permission for Embrace Wellness to use its Mountain Logo Mark.

115. Defendants' actions in using the Embrace Wellness Logo have taken place with full knowledge of Apple Wellness's trademark and, therefore, have been intentional, deliberate, and willful.

116. Defendants' actions are calculated specifically to benefit from the goodwill that Apple Wellness has developed.

117. As a direct and proximate result of Defendants' actions, Apple Wellness has been damaged and will continue to be damaged in an amount to be determined.

**COUNT VI:
Copyright Infringement pursuant to 17 U.S.C. § 106
Shelving Design**

118. Plaintiff repeats and realleges the allegations in the previous paragraphs.

119. The shelving design for the Apple Wellness stores is the subject of a valid copyright and is considered a copyrighted work.

120. Apple Wellness owns the copyright in the shelving design for the Apple Wellness stores.

121. Apple Wellness has the exclusive rights granted to copyright owners under 17 U.S.C. § 106 which include: (i) the right to reproduce the copyrighted work in copies; (ii) the

right to prepare derivative works of the copyrighted works; and (iii) the right to distribute copyrighted works to the public.

122. Knott had access to the shelving design.

123. Defendants copied the protected expression in Apple Wellness's copyrighted work in that they used the shelving design to create shelving for Embrace Wellness that is identical to the shelving in the Apple Wellness Stores for the purpose of selling vitamins and nutritional supplements.

124. Defendants actions have taken place with full knowledge of Apple Wellness's rights therein and, therefore, have been intentional, deliberate, and willful.

125. As a direct and proximate result of the Defendants' actions, Apple Wellness has been damaged and will continue to be damaged in an amount to be determined.

126. Apple Wellness is entitled to recover actual damages and any additional profits realized by Defendants, or statutory damages, at Apple Wellness' choosing, in an elevated amount based on the willful action of Defendants, as well as all costs of litigation and actual attorneys' fees pursuant to 17 U.S.C. §§ 504, 505.

**COUNT VII:
Common Law Copyright Infringement**

127. Plaintiff repeats and realleges the allegations in the previous paragraphs.

128. The shelving design for the Apple Wellness stores is the subject of a valid copyright and is considered a copyrighted work.

129. Apple Wellness owns the copyright in the shelving design for the Apple Wellness stores.

130. Apple Wellness has the exclusive rights granted to copyright owners which include: (i) the right to reproduce the copyrighted work in copies; (ii) the right to prepare

derivative works of the copyrighted works; and (iii) the right to distribute copyrighted works to the public.

131. Knott had access to the shelving design.

132. Knott and Embrace Wellness copied the protected expression in Apple Wellness's copyrighted work in that they used the shelving design to create shelving for Embrace Wellness that is identical to the shelving in Apple Wellness for the purpose of selling vitamins and nutritional supplements.

133. Defendants' actions have taken place with full knowledge of Apple Wellness's rights therein and, therefore, have been intentional, deliberate, and willful.

134. As a direct and proximate result of the Defendants' actions, Apple Wellness has been damaged and will continue to be damaged, in an amount to be determined.

**COUNT VIII:
Injunctive Relief**

135. Plaintiff repeats and realleges the allegations in the previous paragraphs.

136. Apple Wellness has been and, if not enjoined, will continue to use the Apple Wellness Trade Dress and the Mountain Logo Mark in the promotion and sale of its products which causes a substantial amount of confusion for Apple Wellness customers and causes unfair competition.

137. Apple Wellness is likely to succeed on the merits of its claims as Defendants' store is a near exact replica of the Apple Wellness Trade Dress as well as the Mountain Logo Mark.

138. Defendants have been profiting from the unauthorized use of the Apple Wellness Trade Dress and Mountain Logo Mark and have been engaged in unfair competition.

139. Apple Wellness has suffered and will continue to suffer harm by the actions of Defendants as Defendants are likely to continue using the Apple Wellness Trade Dress which has caused and will continue to cause substantial confusion among Apple Wellness customers which exposes Apple Wellness at risk of irreparable damage, and therefore, it is entitled to injunctive relief.

JURY DEMAND

Pursuant to Federal Rules of Civil Procedure Rule 38, Plaintiff, Apple Wellness, demands a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Apple Wellness demands judgment, against David Knott and Embrace Wellness, LLC, jointly and severally, in its favor on each and every claim for relief set forth above and an award for relief including, but not limited to the following:

1. An injunction temporarily and permanently enjoining Knott, Embrace Wellness, and their employees, agents, partners, officers, directors, owners, shareholders, principals, subsidiaries, related companies, affiliates, joint ventures, distributors, dealers, licensees, and all persons in active concert or participation with any of them from:
 - a. Using, including as a backdrop on social media, the Apple Wellness Trade Dress, and any variations thereof, or other imitation, that is likely to cause confusion with the Apple Wellness Trade Dress or any other mark owned by Apple Wellness.
 - b. Using the following that is substantially similar to that of Apple Wellness: bright colored wall paint in a similar hue to the Apple Wellness apple green color coupled with the use of industrial ceiling style painted black; light colored wood

shelving at the same or similar four foot height throughout the interior of the store that is substantially similar to the Maple Shelving; use of light colored wooden shelving throughout the perimeter of the store that is substantially similar to the Maple Shelving; placement of posters of inspirational quotes or with bright and cheery individuals enjoying their health lifestyle in light colored wood frames that is substantially similar to the Maple Shelving directly above the shelving around the periphery of the store;

- c. Utilizing the Apple Wellness Marketing and Sales Techniques;
- d. Using the Mountain Logo Mark and Embrace Wellness Logo and any other trademark owned by Apple Wellness, and variations thereof, or other colorable imitation thereof, that is likely to cause confusion with the Mountain Logo Mark or any other trademark owned by Apple Wellness;
- e. Distributing, promoting, and selling any services or products bearing the Mountain Logo Mark or Embrace Wellness Logo Mark and any other trademark owned by Apple Wellness, any variations thereof, and any other marks that are likely to cause confusion with the Mountain Logo Mark and any other trademark owned by Apple Wellness;
- f. Representing by any means whatsoever, directly or indirectly, that Defendants, any services offered by Defendants, or any activities undertaken by Defendants, are sponsored or licensed by Apple Wellness or otherwise associated or connected in any way with Apple Wellness; and
- g. Passing off any of its products or services as, associated with, sponsored by or in any way affiliated with Apple Wellness.

2. An Order directing Defendants to do the following: change the Embrace Wellness walls to a color other than a bright color in a similar hue to the Apple Wellness apple green; change the ceiling to a style and color other than industrial ceiling style painted black; remove or significantly change the shelving throughout the store so that it is not light colored wood substantially similar to the Maple Shelving and not arranged in a substantially similar layout as that of Apple Wellness; remove the posters and poster frames located around the perimeter of the Embrace Wellness store or otherwise change the poster frames significantly so that they are not the light wood substantially similar to the Maple Shelving.

3. An Order requiring Defendants to cease utilizing the Apple Wellness Marketing and Sales Techniques.

4. An Order requiring Defendants to deliver to Apple Wellness for destruction all goods, advertisements, literature and other written or printed material which bear the Mountain Logo Mark and Embrace Wellness Logo Mark, or any other mark confusingly similar to the Mountain Logo Mark or any other mark owned by Apple Wellness.

5. An Order directing Defendants to remove from all websites or electronic medium that it owns or controls, directly or indirectly, including any online directories or advertisements: the Apple Wellness Trade Dress including as its use as a background for videos or product placement as well as the Facebook cover photo, Mountain Logo Mark or Embrace Wellness Logo Mark, and any other trademark and/or trade dress owned by Apple Wellness, any variation thereof, and any other marks or trade dresses that are likely to cause confusion with Apple Wellness's trademark and trade dress.

6. An Order directing Defendant to file with this Court and serve on Apple Wellness's attorneys, thirty (30) days after the date of entry of any injunction, a report in writing

and under oath setting forth in detail the manner and form in which it has complied with the injunction.

7. An Order requiring Defendant to account for and pay to Apple Wellness any and all profits arising from the foregoing acts of infringement, false designation of origin, unfair competition and copying, and trebling such profits in accordance with applicable statutes and laws.

8. A judgment against Defendants to pay to Apple Wellness compensatory damages in an amount as yet undetermined caused by the foregoing acts of infringement, false designation of origin, unfair competition and copying.

9. A judgment against Defendants to pay to Apple Wellness exemplary damages not to exceed three times the compensatory damages in accordance with applicable statutes and laws.

10. An Order requiring Defendant to pay Apple Wellness's costs and attorneys' fees in this action pursuant to applicable statutes and laws.

11. Other relief as this Court deems just and equitable.

Dated this 16th day of August, 2018.

KRAMER, ELKINS & WATT, LLC

Attorneys for Plaintiff Timothy O'Brien, LLC
(d/b/a Apple Wellness)

Electronically signed by:

/s/ Leslie Elkins
Leslie Elkins
State Bar No.: 1086052

Nicholas C. Watt
State Bar No.: 1083750
17 Applegate Court, Suite 203
Madison, WI 53713
Office: 608.709.7115
Fax: 608.260.7777
elkins@kewlaw.com
watt@kewlaw.com